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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

No. 325

AMERICAN NATIONAL BANK OF NASHVILLE, TENN.,

Plaintiff in Error,

vs.

A. L. MILLER, Agent, Etc.,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief and Argument for Defendant in Error.

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Attorney for Defendant in Error.

MARSHALL & BRUCE CO., NASHVILLE

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ALPHABETICAL LIST OF CASES CITED.

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I.

BRIEF STATEMENT OF THE CASE.

The defendant in error, a citizen and resident of the State of Georgia, sued the plaintiff in error, a citizen and resident of the State of Tennessee, in a common law action for money had and received to recover a deposit of three thousand ($3,000.00) dollars made in the defendant bank by the First National Bank of Macon, Ga., of which bank the plaintiff has been duly elected agent. There was a trial by jury, which resulted in a verdict and judgment in favor of the plaintiff, whereupon the

defendant perfected a writ of error to the Circuit Court of Appeals for the Sixth Circuit, which Court duly affirmed the judgment of the lower court, and thereupon this writ of error was brought seeking to review that judgment.

(Record, pp. 107, 125, 126, 137, 147.)

This action was instituted to recover the amount of a check which had been sent to the plaintiff in error by the First National Bank of Macon, Ga., to be deposited to its credit, and which was actually accepted as a deposit and the amount thereof duly credited to the account of the said First National Bank and charged against the drawer of said check.

Stipulation of Facts, Record, pp. 2 and 3.

To this action, several lengthy pleas were interposed, in neither of which is the truth of the foregoing statement questioned, but in each it is practically confessed but sought to be avoided by certain averments of fact and law, which seek to establish the legal rights of the plaintiff in error to absolutely repudiate its acts of receiving said check and of so crediting and charging the amount thereof upon its books and to allow it to retain said amount for its own use and benefit.

Record, pp. 118 to 124.

During the trial, and at the conclusion of the introduction of defendant's testimony, and before any

testimony in rebuttal was offered, counsel for plaintiff below asked the Court for peremptory instructions on behalf of the plaintiff; whereupon, the Court stated that it would hear the motion, but would not act upon it then, and that plaintiff might introduce his rebuttal testimony and it would act on the motion as of the time it was made.

Record, p. 83.

And again at the conclusion of the introduction of all the testimony presented to the Court, counsel renewed their motion for peremptory instructions on behalf of the plaintiff, and thereupon defendant's counsel made a similar motion on behalf of the defendant.

Record, as corrected and supplied, pp. 103, 139.

After due consideration of both oral and written arguments of counsel upon their respective motions and in pursuance to the duty imposed upon him by law, the Honorable District Judge found the facts.

(Record, pp. 104, 106.)

II.

RELATIVE TO OPPOSING COUNSEL'S STATEMENT OF THE CASE.

Opposing counsel's statement of the case does not set forth all of the material facts found by the lower Court, and for that and other reasons, all of the facts found by the Court are fully and accurately set forth in the appendix to this Brief.

Counsel erroneously and unwarrantedly state that on May 17, 1904, or on the day after the check in question was received and the amount thereof credited to the First National Bank and charged to the drawer of the check by the plaintiff in error, those entries on its books were reversed and the amount of said check applied as a setoff on Plant's indebtedness to it. There is absolutely no justification for such a statement to be found in the testimony or in the Court's finding of facts. The Court's finding on this point is in these words: "that, thereafter, on learning these facts, within a few days the American National Bank charged back its entries on the books, etc." (Record, page 106.) The only direct or positive testimony on this point is that said entries were not changed until May 25, 1904, or nine days after the check was received and credited to the First National Bank. Record, page 75.

III.

ARGUMENT.

Only Questions of Law Can be Determined Upon This Record.

It is solely by a writ of error that the judgment of the lower court and the proceedings had prior thereunto, are brought to this Court for review.

Record, p. 147.

It is insisted that notwithstanding the numerous assignments seeking to raise questions of fact, the only questions which can be reviewed under this writ of error, are limited strictly to those of law apparent on the record.

The practice of this Court in this regard is well settled, as will be seen from the language of Mr. Justice Story in the case of *Hyde* v. *Booracm*, 16 Peters, 169, as quoted in the opinion of the Supreme Court in the case of *Dower* v. *Richards*, 151 U. S., at page 664, to-wit:

> "We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court, below, in order to ascertain whether the judge rightly interpreted the evidence or

> drew right conclusions from it. That is the proper providence of the jury; or of the judge himself, if the trial by the jury is waived, and it is submitted to his personal decision."

For other authorities in point the Court is referred to *King* v. *West Va.*, 216 U. S., 100, and the cases collected by the Court in the case of *Dower* v. *Richards*, 151 U. S., 663.

But assuming, merely for the sake of argument, that opposing counsel had perfected an appeal from the judgment below and thereby endeavored to bring all questions of fact, as well as law, here for review, nevertheless, under the voluntary respective motions of counsel for peremptory instructions in the trial court, this Court would be, and is, prohibited from the consideration of but two questions, viz: First, Was there any evidence to support the court's finding of fact? and, secondly, Was the law correctly applied to those facts?

This is the view both of the lower courts took of the effect of the respective motions of counsel, and it will be shown that they were entirely correct.

Relative to his action upon the respective motions of counsel for peremptory instructions, the court very correctly and conclusively said in overruling the motion for a new trial:

"Both parties having requested the direction of the verdict unaccompanied by alternative requests for special instructions, it became the duty of the court to find the facts and direct a verdict thereon. *Merwin* v. *Magone* (C. C. A. 2), 70 Fed., 776; *Magone* v. *Origet* (C. C. A. 2), 70 Fed., 778; *Bradley Timber Co.* v. *White* (C. C. A. 2), 121 Fed., 779; *United States* v. *Bishop* (C. C. A. 8), 125 Fed., 181; *Phoenix Ins. Co.* v. *Kerr* (C. C. A. 8), 129 Fed., 723; *Mead* v. *Chesborough Co.* (C. C. A. 2), 152 Fed., 998, 1002; *Anderson* v. *Messenger* (C. C. A. 6), 158 Fed., 250, 253; *Mead* v. *Darling* (C. C. A. 2), 159 Fed., 684; and *Beuttell* v. *Magone*, 157 U. S., 154, 157."

"In *Beuttell* v. *Magone*, *supra*, the Supreme Court said that as 'both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law,' and that 'this was necessarily a request that the court find the facts.'"

"In *Anderson* v. *Messenger*, *supra*, Judge Severens, delivering the opinion of the Circuit Court of Appeals for this circuit, said: 'At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in his own favor. . . We are required by the opinion of the Supreme Court in *Beuttell* v. *Magone*, 157 U. S., 154, to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court.'"

Record, p. ——.

In this connection, and in addition to the numerous authorities cited by the lower courts, a short excerpt from the language of the Court of Appeals in the case of the *City of Defiance* v. *McGongale*, 150 Fed. Rep., 691, follows:

> "At the conclusion of the testimony, both parties moved the court for a directed verdict. The court overruled that of the defendant, but sustained the motion of the plaintiff, and directed a verdict in his favor for the whole amount claimed in his petition with interest, and a verdict was returned accordingly. In its opinion in *Beuttell* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654, the Supreme Court said: 'As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof.' This court has frequently enforced this rule, and in disposing of the case before us we are limited to the consideration of the correctness of the result reached by the trial court in its determination of the legal questions involved, as there was evidence to support the findings of fact."

The principle announced in *Beuttell* v. *Magone,* has been consistently adhered to by this Court in the cases of *Gray* v. *Noholoa,* 214 U. S., 112; *Waters-Pierce Oil Co* v. *Texas* (1), 212 U. S., 97; *Minneapolis & St. L. R. Co.* v. *State of Minnesota,* 193 U. S., 563; *McKinley Creek M. Co.* v. *Alaska N. M. Co.,* 183 U. S., 563, and in the case of *Dooley* v. *Pease,* 180 U. S., 126, where this Court used this language:

> "Errors alleged in the findings of a court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such finding could be made."

As absolutely conclusive of this question, it is desired to quote the latest words from this Court on the subject, which are as follows:

> "As both parties moved for a ruling, and as there was nothing more, according to *Beuttell* v. *Magone,* 157 U. S., 154, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law, the judgment must stand."
>
> *Sena* v. *American Turquoise Co.,* 220 U. S., 497.

The decision in the case at bar has been followed by the Circuit Court of Appeals upon this point in the case of *Melton* v. *Pensacola Bank & Trust Co.,* 190 Fed. Rep., 128.

Especially should this rule be applied in this case, because at the conclusion of the general findings of fact and before the case was given to the jury, counsel for defendant were, at their request, allowed to suggest any additional facts which they thought ought to be found, and they requested only two additional findings, one of which was specifically found by the court, and the other was, in the main, found as requested.

Record, pp. 107 and 108.

But no other request was made for any of the other findings set out in the motion for a new trial or in the assignments of error.

Record, pp. 107, 108.

IV.

Counsel's Desperate Attempt to Avoid the Disastrous Effect of the Respective Requests for Peremptory Instructions.

Realizing the disastrous effect of these respective motions, opposing counsel falsely intimate that we abandoned our motions for peremptory instructions in the following language, which is taken from their brief in the Court of Appeals:

> "The defendant in error insisted that the two motions were 'tantamount to taking the case from the jury, or as a demurrer to the evidence,'

> and moved the court to 'take the case and consider it on the testimony.' *This, in necessary effect, was an abandonment of the motion for peremptory instructions by the defendant in error. The trial judge took this view of the matter, and so acted."*

We insist that the statement of counsel in italics is absolutely unwarranted, and the only way in which it can be accounted for or explained, is in the assumption that they considered their case in such a desperate and precarious condition as to justify them in resorting to any means, howsoever unjustifiable, in order to save it.

This record shows without the peradventure of a doubt that not only did counsel for plaintiff below *not* abandon their "motion for peremptory instructions," but that directly to the contrary they made *two motions for such instructions*—one at the conclusion of defendant's testimony (Record, p. 83), and another at the conclusion of all testimony (Record, pp. 103, 139, as corrected)—and there is absolutely nothing in this record to show that counsel ever abandoned, withdrew or modified either of them. But just the contrary is clearly shown to any fair mind from the statement of counsel for plaintiff below, which was made after their last motion for peremptory instructions had been made, which is in these exact words: That "their motion was to direct a verdict in favor of plaintiff for $3,000, with interest

from May 24, 1904, the date the check was charged back." (Record, bottom page 103.) The language quoted in said brief as having been used by counsel for plaintiff below is composed of mere extracts from language used by them in the heat of argument, and at most it contains mere expressions of their opinions, as shown by the use of the adjective "tantamount," and of the adverb "as."

As to the *view* which his Honor, the trial judge, "took" of the effect of the motions for peremptory instructions, and furthermore, as conclusive of whether or not any of said motions made by counsel for plaintiff below were abandoned or waived, it is only necessary to read his language, which follows:

> "Gentlemen of the Jury, both the plaintiff and the defendant have moved the court to give the jury peremptory instructions in this case in favor of the two sides, respectively, and under these two motions it becomes the duty of the court to find the facts *and give the jury peremptory instructions as to the verdict which they shall return.*"
> Record, p. 104.)

How any person who professes to understand the English language in the least could honestly misconstrue this language of his Honor is inconceivable.

It is by such methods that opposing counsel attempt to avoid the effect of their voluntary action, in the trial court, of joining with us in asking "the court to instruct a verdict" by which "both affirmed

that there was no disputed question of fact which could operate to deflect or control the question of law."

In the first place, opposing counsel, in support of their argument that the court was not justified in its action upon the respective motions for peremptory instructions, quote a short extract from the opinion of the Supreme Court, in the case of *Beuttell* v. *Magone*, 157 U. S., 157, which is a small portion of the paragraph of said opinion from which it is taken. Counsel's motive will be readily seen from the reading of the exact language of the whole paragraph, which is as follows:

> "The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, *within the intendment of revised statutes, Sections* 649, 700. *As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, thereby, concluded by the finding made by the court upon which the resulting instruction of the law was given.* The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. *Lehnen* v. *Dickson*, 148 U. S., 71; *Runkles* v. *Burnham*, 153 U. S., 216."

The extract used by opposing counsel, when read in connection with the language which immediately follows it in the same paragraph, will be seen to refer specifically and solely to the construction of the Federal statute therein mentioned and to have no such meaning as is attempted to be given it by opposing counsel. Again, they rely upon another short extract from an opinion in the case of *Menahan* v. *Grand Trunk West Ry. Co.*, 70 C. C. A., 463. But obviously the present case does not fall within the statement made by Judge Severens in that case, to the effect that the decision in *Beuttell* v. *Magone, supra,* "cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court," *since counsel's request for peremptory instructions in this case was not coupled with a request or requests for other special instructions,* "directed to particular aspects of the case." (Record, p. 112.) Furthermore, to hold otherwise would make the language used by Judge Severens in the later case of *Anderson* v. *Messenger,* 158 Fed. Rep., 250-253, wholly irreconcilable with that used by him in the earlier case just referred to. For in *Anderson* v. *Messenger* he said: "At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in

his own favor. . . . *We are required by the opinion of the Supreme Court, in Beuttell* v. *Magone,* 157 U. S., 154, *to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court."*

Opposing counsel in the Court of Appeals, for the first time, raised the question that our right to peremptory instructions was waived by introducing testimony in rebuttal.

It has been just shown as a matter of fact that there was no waiver by the defendants below of either of the motions, and that the court below so understood it.

In support of this contention, opposing counsel cite the cases of *Runkle* v. *Bernham,* 153 U. S., 216; *Union Pacific Railway Co.* v. *Snyder,* 152 U. S., 684, as holding that where a plaintiff at the conclusion of defendant's testimony makes a motion for peremptory instructions in its behalf which is not acted upon by the court, and the plaintiff thereupon introduces rebuttal testimony and after all other testimony is in and the case closed, said plaintiff renews or makes another motion for peremptory instructions, the said motion is waived by the introduction of testimony in rebuttal.

But a most casual examination of those authorities will show: First, that the motions in those cases were made by the defendants at the conclusion of the plaintiff's testimony, and were overruled, and afterwards the defendants introduced their testimony and *failed to make or renew their motions for peremptory instructions after all of the testimony was in and the case closed.*

It needs no elaboration to show that those authorities have absolutely no bearing upon the correctness of the action of the lower court upon the respective motions of the parties in this case.

It is confidently asserted that opposing counsel can not cite a case where the court holds that the introduction of testimony in rebutal, after refusal of the trial court to pass upon a motion for peremptory instructions, defeats the plaintiff's right to make or renew its motion after the introduction of all the testimony and the case closed. But just the contrary principle is established by the Supreme Court of the United States in the case of *Robertson* v. *Perkins,* 129 U. S., 236, wherein it appears from the court's own language, that:

> "At the close of the plaintiff's evidence, the defendant moved the court to direct a verdict for the defendant, on the further ground that the plaintiff had not shown facts sufficient to entitle him to recover. The motion was denied by the court and the defendant excepted to the

> ruling. But, as the defendant did not then rest his case, but afterwards proceeded to introduce evidence, the exception fails." . . . "At the close of the testimony on both sides, the defendant moved the court to direct a verdict for him, on the grounds, that the plaintiff had not produced sufficient evidence to make a case." . . . The motion was denied by the court, and the defendant excepted to the ruling."

The court held that the defendant's motion to direct a verdict for him which was made at the close of the case, or his renewed motion, should have been granted by the trial court, and for this error on its part this Honorable Court reversed the judgment of the lower court and directed it to grant a new trial.

Not waiving or modifying our insistance that upon this record only pure questions of law apparent upon the face of the record can be considered, but simply assuming, merely for the sake of argument, that the question of the sufficiency and weight of the testimony upon which the findings of fact were based, was presented by the record, we have, in an appendix to this brief, carefully and laboriously shown that each and every finding of fact made by the trial court is supported by an abundance of uncontradicted testimony.

In order to show this correctly and conclusively, the findings of facts are correctly divided into natural paragraphs, and immediately following each of

said paragraphs is shown, by specific reference to the record, ample evidence to support each and every fact therein found. This showing will be found in appendix of our brief, and we are content to stand thereupon.

It is earnestly insisted that the foregoing authorities and reasons fully sustain the Court of Appeals, and the trial court in holding that the request by each party for peremptory instructions in its favor, under the circumstances disclosed by this record, amounts to an admission by both parties that the evidence was not in conflict, and to a request that the court determine the facts.

V.

The Court of Appeals' and the Trial Court's Legal Conclusions Upon the Findings of Fact Are Supported by an Abundance of the Best Authorities and Reasons.

The lower courts held, as a matter of law upon the facts as found by it, that R. H. Plant and the First National Bank of Macon, Ga., both having running accounts and deposits in the American National Bank, the moment the latter bank received from the former bank the check of R. H. Plant for credit to the account of the First National Bank, and accepted

said check and credited the amount of said check to the account of the First National Bank, the transaction was closed and the relation of the creditor and debtor became established; and that the First National Bank of Macon had the right to immediately withdraw the amount of said check in the sum of $3,000.00 from the American National Bank, which right still exists in the defendant in error in this case.

Record, pp. 107, 146.

In the case of *New York County Bank* v. *Massey*, 192 U. S., 145, Mr. Justice Day, in speaking of the relations between a depositor and a bank in regard to money deposited, said:

> "The money deposited becomes a part of the general funds of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character, or, as defined by Mr. Justice White, in the case of *Davis* v. *Elmira Springs Bank*, 161 U. S., 275-288:
>
> " 'The deposit of money by a customer with his banker is one of loan, with the super-added obligation that the money is to be paid, when demanded, by a check.'
>
> " 'It is true that the findings of fact in this case establish that at the time these deposits

were made the assets of the depositors were considerable less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears, Stege Brothers might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition.' "

The relationship between a depositor and his bank having been above shown by authorities, the next natural inquiry is, What are the rights of a depositor growing out of said relationship? Those rights as defined by the courts of last resort of several States and of the Court of Appeals and of the Supreme Court of the United States, are shown by excerpts from decisions below.

In the case of *Oddie* v. *Bank*, 15 N. Y., 735, it is said:

"Where a genuine check is drawn by one of its customers upon a bank is presented by the drawee to the bank for deposit, it is substantially a demand for payment. If the bank accepts and pays it, either by delivering the currency or giving the party credit for this deposit, the transaction is closed between the bank and such party, and where the account so presented was credited upon a deposit slip by the officers of the

bank, held: 'The bank became liable for the amount of the check, although on the same day and before the close of banking hours, but after it had deposited other checks of the drawer's presented later, it returned the check to the depositor as not good, although the account of the drawer was overdrawn at the time of the deposit.' "

In the case of *Bank* v. *Burns*, 68 Ala., 287, it was held:

"Where a contract is drawn by one of the bank's depositors in favor of another, is presented by the latter, and amount thereof is credited upon pass-book as deposit, and check placed on file of paid and cancelled checks, and afterwards amount of check is also entered to his credit and charged against drawer, these facts constitute a payment by bank of check, and amount cannot be withheld by bank on discovery that check was an overdraft and drawee insolvent."

Again, in the case of *Bank* v. *Gregg*, 138 Ill., 168, it was held:

"Where a bank accepts checks drawn on it, stamps same as paid, enters amount thereof to credit of holder presenting the check, this will be payment of check, although bank may fail to charge account of drawer with amount. Bank has no authority to charge back the amount."

Also in the following cases from different States, the same principle has been upheld, to-wit:

Levy v. *Bank*, 4 Dallas, 234; *Briggs* v. *Bank*, 89 N. Y., 182; *Board* v. *Robinson*, 81 Minn., 305; *Hoffman* v. *Bank*, 46 N. J. Law, 604; and *Daniel* v. *Bank*, 67 Ark., 223.

In the case at bar, the defendant below not only accepted the check in controversy, and mailed plaintiff notice of its action, but actually made entries upon their books to effectuate a transfer of the money from the account of the drawer to that of the payee, the First National Bank of Macon. At the time of this transaction both payee and drawer had running accounts with said defendant bank, and the drawer had sufficient funds on deposit with said defendant bank to pay said check.

Record, p. 106.

Upon this point the Court of Appeals for the Fifth Circuit, in the case of *Montgomery County* v. *Cochran*, 126 Fed. Rep., 456, held:

> "When, *in the absence of fraud*, a check is presented in a bank by the payee and received as a deposit, and credited on his account in the bank, the check is paid. The transaction is the same in effect as if the cash had been handed to the payee, and by him returned to the bank. This result does not depend on the amount of the cash in the bank being equal to the check,

nor on the financial condition of the bank as shown later on a settlement of its affairs after insolvency."

(*Italics ours.*)

In the case of *National Bank* v. *Burkhardt*, 100 U. S., 689, it appears that at an early hour in the forenoon the payee of the check handed it in at the bank upon which it was drawn, without a pass-book, as a deposit, and the same was taken by the receiving teller and simply laid aside.

It does not appear, as in this case, that the bank ever charged the amount of the check against the drawer or credited the amount to the payee, or that it notified the payee that such had been done.

The question was, whether under such circumstances the bank was liable to the payee for the amount of the check.

In answer to this question, this Court said:

"When a check on itself is offered to the bank as a deposit, the bank has the option to accept or reject it, or to receive it as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, *there being no fraud and the check genuine*, the parties are no less bound and concluded than in the former case. *Neither can*

> *disavow or repudiate what has been done.* The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent Chief Justice: 'If there has ever been a doubt on this point, there should be none hereafter.' *Oddie* v. *National City Bank of New York,* 45 N. Y., 735."
>
> (*Italics ours.*)

It is proper to state here that the principle announced in this case has never been in the least modified by any subsequent decision of this Court, nor can a case be found in any of the Federal Courts adjudicated subsequent to the date of said decision wherein the court has failed to give full force and effect to said principle.

The foregoing numerous cases conclusively maintain the legal principle, applied by the lower court to the facts as found by it, to the effect that, "When in the absence of fraud, a check is presented to a bank by a payee and received as a deposit, and credited on his account in the bank, the check is paid," and the "bank has no authority to charge back the amount" of the check against the payee, as was done in this case.

It is, therefore, earnestly insisted that unless it conclusively appears upon this record that the agents or officers of the payee bank in this case were guilty

of fraud in their transactions with the plaintiff in error relative to the depositing of said check, the judgment of the lower court should be affirmed.

VI.

Unless it Conclusively Appears on This Record That the Officers or Agents of the Payee Bank in This Case Were Guilty of Actual Fraud, the Judgment Must be Affirmed.

The only assignments of error which, in the slightest degree, can be said to raise a question of fraud, are assignments numbered 3, 3-A and 3-B. In fact, it is only claimed in their brief in this court that assignment No. 3 merely raises the question of payment under mistake of fact.

Neither of said assignments directly charge any positive act of fraud against any of the agents or officers of the First National Bank, but merely seek to inferentially establish fraud on its part by charging that as certain officers of said bank had knowledge of certain facts which are alleged to have been material to the plaintiff in error before and at the time the amount of the check in question was credited to said First National Bank, which they failed to communicate to plaintiff in error, was such bad faith on their part as to amount to fraud.

The substance of all of said assignments is that the defendant below "was ignorant of the insolvency, suspension, or bankruptcy of R. H. Plant when it made the book entries which are relied upon as a payment of the check in question, and when it mailed its letter of advice, and supposed that said Plant was solvent," whereas "on the other hand, the First National Bank, when it received said check," and "before said book entries were made and said letter of advice was mailed, knew that Plant was insolvent, had suspended the payment of his debts and the transaction of business, and that a petition in bankruptcy had been filed against him, and that said Plant was indebted to defendant in the sum of $50,000.00."

In each of said assignments, it is solely alleged that as Messrs. Plant and Hurt, as officers of said First National Bank, had knowledge of the foregoing facts, their knowledge thereof is, in law, the knowledge of said bank, and upon this allegation is based the conclusion that "said bank, therefore, acted in bad fiath in not communicating these material facts to the defendant."

The fatal fallacy of this conclusion lies in the false assumption that, under the facts and circumstances of this case, the alleged knowledge of either Plant or Hurt can be imputed to the First National Bank.

As to R. H. Plant's connection with or his direction of the affairs of the First National Bank at and

before the time of the receipt in question by it, the court found positively "that at the time this $3,000 check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks" (Record, p. 105), and "that he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness." And, furthermore, as to whether or not the First National Bank had any actual knowledge of Plant's financial condition or his indebtedness to the plaintiff in error, the court unequivocally found the facts to be "that the officers and agents of the First National Bank of Macon, who were conducting *its* affairs during his sickness, and who received and accepted this $3,000 check and forwarded it to the defendant bank, when they received and forwarded it, had no knowledge of Plant's insolvency, and that they furthermore had no knowledge of the fact that Plant was individually indebted to the American National Bank by reason of his $50,000 of accepted drafts."

Record, p. 105.

As to Mr. Hurt, it is merely found that he was cashier of R. H. Plant's private bank and that he was a director and a member of the Finance and Executive Committee of the First National Bank.

Record, p. 107.

The court did not find, nor was it requested to find, nor was there any evidence to justify a finding, that he even know or believed that Plant was insolvent or that he owed the plaintiff in error any amount, or that he had the slightest thing to do with the receiving, accepting, or forwarding of the check in question for or on behalf of the First National Bank.

It is well settled law that where the agent has knowledge of transactions which he gained in affairs in which he was acting for himself alone, and not for his principal, cannot raise a legal presumption of knowledge on the part of the principal.

Upon this proposition this court said in the case of *McCaskill* v. *U. S.*, 216 U. S., 514, that, "Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interests distinct from theirs. Their interests, it may be conceived, may be adverse to its interests, *and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it.*

This principle has been well settled by many decisions of this Court, and of the Court of Appeals, and a few applications by the courts of this principle follow:

Louisville Trust Co. and others v. *Louisville Railway Co.*, 75 Fed. Rep., 433, was a case in which certain bonds issued by a corporation was sought to be defeated upon the ground that the president of a company seeking to enforce said bonds had knowledge of their invalidity at the time the company took them. Judge Taft, in deciding that part of the case in which this point was involved, said:

> "The Kentucky National Bank holds eighteen bonds. It acquired five as collateral to a loan of $4,300, made January 9, 1890, to W. W. Jenkins; eight on a loan of $7,200, to Osborne & Co., January 11, 1890; and five on a loan to William Cornwall, for $3,500. These loans were all made by the bank, acting through its president, J. M. Fetter. Fetter was a director in the New Albany Company, and knew that no petition of the stockholders for the guaranty had been filed with the board. Under the rule laid down in the Distilled Spirits case and other cases cited above, the bank must be charged with notice of the defect in the guaranty, so far as the ten bonds received on the Jenkins and Cornwall loans are concerned. It appears, however, that Fetter was a part owner in the Osborne bonds, and that the loan was in part for his benefit. Under these circumstances we think that the bank cannot be affected with the knowledge of Fetter in that transaction, and it appears that the other directors of the bank had no knowledge of the defect at all. *Innerarity* v. *Bank*, 139 Mass., 332 (1 N. E., 282); *Read* v. *Doak*, 22 U. S. App., 669 (12

C. C. A., 643, and 65 Fed., 341); *Wilson* v. *Pauly,* 18 C. C. A., 475 (72 Fed., 129)."

In the case of *McCalmont* v. *Lanning,* 154 Fed. Red., 353, it was said:

"After examining the proofs, we are of opinion there was, under the proofs, no question to submit to the jury. Assuming, for the present purposes, that fraud was practiced on the defendant in securing from him the note for the stock of the Fraser Mountain Copper Company, and that Twining, the president of that company, had knowledge of that fact, still the mere fact that such officer was also president of the plaintiff company does not visit the latter with notice. There is nothing in the record tending to show that the trust company did not discount the note in good faith before maturity, or that Twining had anything to do with, or, indeed, knew of, its discount. Now, in *Willard* v. *Denise,* 50 N. J., Eq., 482 (26 Atl., 29; 35 Am. St. Rep., 788), it is held that to visit a bank with knowledge of its officer, gained in another relation, two things are necessary: First, possession by the agent of pertinent information; and, second, such agent's participation in the discount or purchase on behalf of the corporation. In view of that case and of *First National Bank* v. *Christopher,* 40 N. J. Law, 439 (29 Am. Rep., 262), and *Barnes* v. *Trenton Gaslight Co.,* 27 N. J., Eq., 33, we hold the trust company was not visited with the knowledge of its president,

Twining, and was, therefore, an innocent purchaser."

In the case of *Earle* v. *Mance*, 133 Fed Rep., 1008, it was said:

"The plaintiff moves for judgment for want of a sufficient affidavit of defense. The declaration is upon a bond executed by the defendant and another in favor of the plaintiff, and for an overdraft by check on the Chestnut Street National Bank, of which the plaintiff is now receiver. The defense is that the president of the Chestnut Street National Bank, prior to its failure, was also president of another institution in which the defendant had a deposit, and that the president of the Chestnut Street National Bank assured defendant of the soundness of this other institution, which assurance was afterwards found to be erroneous, and by reason thereof the defendant claims to have lost a sum in excess of the claim in this suit. Because the president of the Chestnut Street National Bank was the president of the other institution about which this erroneous information was furnished, the defendant attempts to set off his loss there against the claim here. This cannot be allowed."

In the case of *Union Central Life Insurance Co.* v. *Robinson*, 148 Fed. Rep., 358, the Circuit Court of Appeals for the Fifth Circuit said:

"There is, however, an exception to the general rule, which is as well established as the rule

itself. The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to the interest of his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule, because, first, he will be likely in such case, to act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances. *Thomson-Houston Electric Co.* v. *Capitol Electric Co.* (C. C.), 56 Fed., 849; *Frenkel* v. *Hudson,* 82 Ala., 158 (2 South., 758; 69 Am. Rep., 736)."

The antagonistic interest of Plant in this case was in the fact that it was to his advantage to suppress the knowledge of his insolvency as long as possible for the reason that if the First National Bank, through whom he had been negotiating his various loans and papers, was informed that he was insolvent, although he was the president of the bank, and possibly the managing director of the bank, yet it stands to reason that the stockholders of the First National Bank of Macon, who, under the law, are liable for double the amount of their stock, would immediately order the cashier of that bank to cease handling the paper of said Plant, and would also take steps to either put Plant in bankruptcy or to secure his indebtedness to said bank.

The inability of Plant to secure his indebtedness to said First National Bank is shown in the aftermath of the insolvency proceedings had in reference to I. C. Plant's Sons' Bank.

In the case of *Bank of Overton* v. *Thompson,* 118 Fed. Rep., 798, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is claimed on behalf of the complainant that as Hardinger certainly had full knowledge of complainant's interest in the cattle, and in the money for which Hardinger sold them, and as he was the cashier of the defendant bank, when, as such, he took into that bank the deposit made there by himself as an individual depositor, his knowledge of all the facts connected with the rights of the complainant to that money is imputable to that bank, under the well-settled general rule that the knowledge of an agent, or notice to an agent, while acting within the scope of his authority, is notice to his principal, because within that scope he is the *alter ego* of the principal, and because the law will presume that the agent has performed his duty to disclose to his principal all notice to himself necessary to his principal's protection or guidance. The officer of a corporation, like a cashier of a bank, is such agent. There are, however, well-settled exceptions to this rule, where notice or knowledge on the part of the agent will not be imputed to the principal, and one of these is 'where the agent's relations to the subject-matter, or his previous

conduct, render it certain that he will not disclose it.'" Mechem, Ag., section 721. "*In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.* *Id.*, sec. 723; *Koehler* v. *Dodge*, 31 Neb., 329, 336 (47 N. W., 913; 28 Am. St. Rep., 518); *Bank* v. *Sharpe*, 40 Neb., 123, 127 (58 N. W., 734); *Benton* v. *Bank* (Mo.), 26 S. W., 975; *Bank* v. *Lovitt*, 114 M., 519 (21 S. W., 825). In the case last cited it is said:

> "'*An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank, and he represents himself, and not the bank. The law is well settled that, when an officer of a corporation is dealing with it in his individual interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction.*'

"Notwithstanding some dicta and one decision—*Bank* v. *Blake* (C. C.), 60 Fed., 78—to the contrary, it is fairly *well settled that knowledge of an agent, actually concealed from his principal, while the agent is dealing with the principal on his own account*, is not to be imputed to the principal, *even though the agent, assuming to act as such, did whatever was done on the part of the principal in the transaction with*

himself, if disclosure of the matter concealed would have had a tendency to defeat his purposes. His position would be as antagonistic to his principal, and his motive for concealment as great as, and easier of accomplishment than, if he were dealing with the principal directly, or with another agent."

(*The italics are ours.*)

Many other authorities directly in print may be found in Thompson on Corporations, at section 4657; Morawitz, Corporations (2d Ed., 504c; 1 Morse on Banks, 104; *Levy & Cohn Mule Co.* v. *Kauffman,* 114 Fed. Rep., 170; and *Wait* v. *Santa Cruz,* 89 Fed. Rep., 619.

Upon the foregoing authorities and reasons it is most earnestly insisted that both of the lower courts were correct in holding that there was no fraud on the part of the First National Bank in this case.

The decision in the case at bar has been followed by the Circuit Court of Appeals upon this point in the recent cases of *Skud* v. *Tillinghast,* 195 Fed. Rep., 5. and *Melton* v. *Pensacola Bank & Trust Co.,* 190 Fed. Rep., 126, 137.

VII.

THE DRAWER OF THE CHECK IN QUESTION HAD THE LEGAL RIGHT TO PAY THE FIRST NATIONAL BANK THE AMOUNT OF HIS BONA FIDE INDEBTEDNESS, IRRESPECTIVE OF WHETHER HE WAS SOLVENT OR INSOLVENT.

It is argued by opposing counsel that the First National Bank had no legal right to the check in question because Plant gave the same to it when he was insolvent and when he was indebted to the plaintiff in error.

There is no allegation or proof whatever that the trustee of Plant's estate ever recovered or attempted to recover, or charge to the account of the American National Bank the $3,000.00 credited to the First National Bank of Macon.

The only loss or detriment suffered by the American National Bank, and the only loss alleged by them to have been suffered, is the fact that they would, if forced to pay to the First National Bank the money credited to its account, lose their doubtful right to set off and appropriate the amount of the check in controversy upon an indebtedness not yet due, which Plant owed them on his unsecured drafts.

It is submitted respectfully that the First National Bank, as a matter of law, did not have knowledge of any fact or circumstance at the time it paid said check, which it was either in good conscience, or in law, called upon to communicate to the plaintiff in error.

If the said bank had not been guilty of negligently taking and holding the unsecured drafts of Plant, their payment of his check could not have harmed them in the slightest degree.

It would be contrary to all reason and logic to say that a person who has a check cashed, having knowledge of facts which, if known to the drawee bank, would cause them to refuse payment, could be made in a suit to refund the amount paid by the bank, he having received the same in *entire ignorance* of the *peculiar condition of the business relations between the drawer* and the bank which would render a payment under the special circumstances detrimental to its interests. *The bankruptcy of Plant could not have been detrimental to defendant had they not held his unsecured drafts.*

Is the depositor in a bank to bear the burden and risk of the bank which takes the unsecured drafts of another of its depositors under such circumstances? Suppose Plant, instead of having gone into bankruptcy, was simply about to depart perma-

nently from the country for residence in South America or some other foreign land, and plaintiff, after having accepted and forwarded the check in question, had learned of his intended departure and cashed the same in the identical way it did, and after Plant's departure the American National Bank had sought to appropriate the money upon its drafts on the ground that payee should have informed them of that fact, would anybody say they would have the right to retain it? Are customers presumed to know all the negligent loans made by the bank, and upon that hypothesis notify them of all circumstances which could in any way be of detriment to them? The burden would be intolerable and payment by check practically worthless.

Furthermore, as heretofore stated, Plant owed the First National Bank of Macon a sum in excess of the amount of this check. That he issued his check upon the American National Bank, in which he had funds sufficient to meet said check in favor of the First National Bank of Macon in payment of a *bona fide* indebtedness existing between Plant and said First National Bank.

Plant had the legal right to pay the First National Bank this *bona fide* indebtedness, irrespective of whether he was solvent or insolvent, and it was not incumbent upon Plant, much less the First National Bank of Macon, to inform the American National Bank of his insolvency.

He had the same right to issue this check upon the American National Bank, in which bank he had sufficient funds to meet the same and give it in payment to the First National Bank of his indebtedness to that bank as he would have had the right to have gone into his pocket and taken out of it $3,000 in cash to pay said bank.

In the last event, neither the American National Bank nor any of his other creditors could either impeach the validity of the transaction or recover from the American National Bank the amount of said money so paid to the First National Bank. There being nothing illegal in such transaction, and Plant having a legal right to pay any of his debtors that he saw proper the amount of their indebtedness in full, no one can complain of such legal transaction, there being no fraud in fact or in law attending such transaction.

In other words, he had a perfect right in law, if he saw fit, to prefer the First National Bank as to any other creditor, and to pay that bank in full his indebtedness, and such payment would work no injury that is actionable to his other creditors.

If the insolvency of Plant and the further fact were known to the American National Bank that he (Plant) intended to prefer the First National Bank and take from his estate a sufficient amount of funds to pay the First National Bank of Macon his entire

indebtedness, neither the American National Bank nor any of his creditors could even, by injunction, maintain a suit against him to enjoin him from making such a payment, or preference, as you may see proper to call it.

160 U. S., 149, *Bamberger* v. *Schoolfield.*
144 U. S., 595, *Crawford* v. *Neal.*

If the above propositions are sound, it naturally follows that it was not the duty either of Plant or of the First National Bank of Macon to have given notice to the American National Bank of Nashville, Tennessee, of the insolvency of Plant.

Therefore, it is confidently submitted that the alleged knowledge of Plant and Hurt of the material facts set forth in plaintiff in error's said assignments under the numerous authorities above quoted, and the foregoing application of the facts of this case thereto, cannot be imputed to or charged against the First National Bank, and this being so, it must necessarily follow that opposing counsel's conclusion that said First National Bank acted in bad faith in not communicating such knowledge to the plaintiff in error, which is based thereupon, must be false.

As said assignments are the only ones to be found in this record that under any construction it can be even argued that any of the agents or officers of the First National Bank were guilty of fraud in their transactions or dealings with the plaintiff in error,

relative to the receipt and forwarding of the check in question, upon the authority of the case of *National Bank* v. *Burkhardt,* 100 U. S., 689, and the numerous Federal Court decisions heretofore cited, the judgment of the lower court should be affirmed.

VIII.

To Take an Amount From the Account of One Depositor and Apply It to the Indebtedness of an Independent Debtor of the Bank, is Revolutionary.

Under assignments one, two, and three, the single claim is made that plaintiff in error was entitled to repudiate its payment of the check in question, because it was made in ignorance of Plant's insolvency or bankruptcy, and that therefore it had the right to take the amount of said check which it had so paid and apply it to the payment of Plant's drafts.

(Record, p. 148.)

Said claim involves two propositions of law, both of which must be resolved in favor of plaintiff in error before said claim can be maintained. The first is whether or not, under the facts as found by the court, the plaintiff in error was entitled to repudiate payment of said check because of its ignorance of

said facts; and the second, and dependent proposition, is, assuming that it did have the right, did it have the further right to apply the amount of said check to the payment of said drafts? We insist that neither of said propositions can, nor have been established.

In order to properly consider this proposition in the light of the facts as found by the court and its legal conclusions thereupon, which have been heretofore fully discussed, it will be necessary to state the substance and effect of what has been heretofore shown, namely, that under the authority of the Burkhardt case and numerous other authorities in Section V of this brief, the entries made by the American National Bank upon its books constituted the payment of so much money in actual cash to the First National Bank of Macon, Ga., by the said American National Bank out of the funds of R. H. Plant in its hands as a depositor of said bank.

Neither Plant nor the American National Bank had any control of that money as the money of R. H. Plant. The indebtedness of the American National Bank to R. H. Plant was thereby diminished to the extent of $3,000.00 when his account was charged with $3,000.00 and the First National Bank's (of Macon) account was credited with said amount. In other words, the transaction between Plant and the American National Bank was closed and perfected literally by virtue of the actual entries made by the

American National Bank and legally in accordance with usual customs and laws governing banking institutions. In other words, the moment the entries were made upon the books of the American National Bank, the title to said $3,000.00 of money passed from the American National Bank and R. H. Plant and immediately vested in the First National Bank of Macon, Ga., and thereby became a transaction not between Plant and the American National Bank, but a transaction between the First National Bank of Macon, Ga., an entirely independent, different and innocent third party, and the American National Bank of Nashville.

This fact has been entirely overlooked or disregarded by opposing counsel from the beginning of this litigation to the present time, as shown from the argument and cases cited in support thereof by them between pages — and — of their brief filed in this court. For an examination of said cases will reveal that all of them involved the right of setoff, or the right to repudiate a payment made under a mistake of facts *merely and solely between original or primary parties before the rights of innocent third parties have intervened,* such as between the drawer and drawee of checks, mortgagor and mortgagee, assignor or assignee, etc.; or where the check in question had never been accepted, or where the check was not genuine, or where there was fraud on the part of the holder of the check. As an illustration

of this we will take the principal case cited of *Bank* v. *Whitman*, 94 U. S., 343, which is repeatedly referred to by counsel.

In order to show that this case furnishes absolutely no authority in support of plaintiff in error's extraordinary claim in this case, it is hardly necessary to do more than to quote the following language of the court:

> "The question is this: Can the *payee of a check*, whose endorsement *has been forged* or made without authority, and when payment has been made by the bank on which it was drawn, upon such an unauthorized endorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon the principle and authority, that the *payee of a check unaccepted* cannot maintain an action upon it against the bank on which it is drawn."

Unlike this case, it was not claimed, nor could it have been claimed, in that case, that the rights of an innocent third party had intervened, and furthermore, the bank in that case had never accepted the *lawful* holder's check for payment, nor had it ever credited the amount of the check to the lawful holder thereof, as was done in this case. The only thing which the bank did in that case was caused by the criminal act of a forger, which caused said bank to wrongfully pay the amount of said check to him, but there is no claim in this case that any agent or officer

representing the First National Bank in the transaction relative to this check was guilty of anything resembling a criminal act. Furthermore, the defendant in error in this case is not, like the payee in that case, asking the bank to pay the amount of the check in question twice.

The Whitman case does not hold, nor can, or have opposing counsel cited a case that holds where a *bona fide* holder for value acquires a check, and that check is presented by such *bona fide* holder, and the amount of the check is paid such holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check, after the same has been closed and the amount so paid to the payee of the check, can be repudiated, or that such amount could be recovered from the payee of the check by the bank paying said check, nor can they cite a case giving the bank under such circumstances the right to setoff as against such third party.

But on the other hand, there are many authorities of the highest character which hold that such cannot be done, and notably is the case of *Hoffman* v. *Bank of Milwaukee,* 12 Wallace, 181, decided by the Supreme Court of the United States, where the bank had discounted drafts drawn by parties at Milwaukee on Hoffman & Co., to which were attached bills of lading purporting to represent shipments of flour. Hoffman & Co. accepted and paid the drafts. The bills of lading proved to be forgeries, and Hoff-

man & Co. sued the bank to recover the money paid. It was contended that they had accepted and paid the drafts in the belief that the accompanying bills of lading were genuine, and that, *had they known the real facts*, they would not have accepted and paid the drafts, and could not have been compelled to do so, in which case the loss would have fallen on the bank; that, is, that they *paid the drafts under a mistake of facts*. But the court answered:

> *That money paid as in this case by the acceptor of a bill of exchange to the payee of the same, or to a subsequent endorser in discharge of his legal obligation as such, is not a payment by mistake, nor without consideration, UNLESS IT BE SHOWN THAT THE INSTRUMENT WAS FRAUDULENT IN ITS INCEPTION, OR THAT THE CONSIDERATION WAS ILLEGAL, OR THAT THE FACTS AND CIRCUMSTANCES WHICH IMPEACH THE TRANSACTION AS BETWEEN THE ACCEPTOR AND THE DRAWER WERE KNOWN TO THE PAYEE OR SUBSEQUENT ENDORSEE AT THE TIME HE BECAME THE HOLDER OF THE INSTRUMENT."*

The court further held that "*different rules apply between the immediate parties to a bill of exchange —as between the drawer and acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that*

consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill—as, for example, between the payee and the acceptor, or between the endorsee and the acceptor—as two distinct considerations come in question in every such case where the payee or endorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence of failure of both these considerations."

"Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote endorsee against the acceptor, that if any intermediate holder between the defendant and plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

The court further said:

"The failure of consideration, as between the drawer and acceptor of a bill of exchange, is no

defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument."

Again, the same high tribunal in the case of *Goetz* v. *Bank of Kansas City*, 119 U. S., 551, where an acceptor of a bill of exchange discounted by a bank, with a bill of lading attached, which the acceptor and the bank regarded as genuine at the time of the acceptance, but which turned out to be a forgery, held: that the acceptor is bound to pay the bill to the bank at maturity, and that the bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration or circumstances upon which it was made, issued or accepted. These highest of authorities clearly establish the principle that, as between remote "*parties secondarily liable on commercial paper—e. g., acceptors or drawee and payees—money paid to the latter cannot be recovered back unless it is shown that there was fraud and a failure of consideration which was known to the payee at the time he acquired the paper.*"

As there has never been any dispuate about the First National Bank being the payee of the check in

question, and as it was specifically found by the court that none of the agents or officers of that bank at the time they received or accepted said check, and forwarded the same to the plaintiff in error, knew of Plant's insolvency or bankruptcy, or of his owing plaintiff in error anything (Record, p. 105), and as it is not claimed that said First National Bank had any other knowledge which would affect its title to said check, it is earnestly insisted that upon the principle established by said authorities the plaintiff in error has no right to retain the amount of the check in question, which it credited or paid to said First National Bank.

Opposing counsel have not cited a case that holds that where a *bona fide* holder for value acquires a check, and that check is presented by such *bona fide* holder, and the amount thereof paid said holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as against a third party under such a state of facts, for such a decision would be revolutionary.

IX.

Assignment No. 1, Raising the Question of "Want of Privity," is Not Supported by Any Authority, Logic or Facts.

The assignment above mentioned, raising the question of want of privity between the First National Bank and the Plaintiff in error, is based solely upon what opposing counsel claim to be an authority found in the case of *First National Bank* v. *Whitman*, 94 U. S., 343, and other cases, which are entirely alike in so far as the condition and relationship of the parties and the principles involved are concerned.

It being fully shown in preceding Section VIII how said cases differ in many material respects from the one at bar, and why thay have no bearing upon the question now at issue, consequently it is deemed unnecessary to consume further time in the discussion thereof.

In this connection it is only desired to say that in the case at bar Defendant below not only accepted the check in controversy and mailed the First National Bank of Macon notice of its acceptance, but actually made the entries upon their books to effectuate a transfer of the money from the account of the drawer

to that of the payee, the First National Bank of Macon. At the time of this transaction both payee and drawer had running accounts with the Defendant bank, and the drawer had sufficient funds on deposit with the bank to pay the check.

With this in mind, it is only necessary to again refer to the language of the Supreme Court of the United States, in the case of *National Bank* v. *Burkhardt*, 100 U. S., 589, which has been fully considered in preceding Section V, together with other numerous authorities in point, viz.: "When a check upon itself is offered to the bank, as a deposit, the bank has the option of accepting or rejecting it, or accepting it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit, and accepted as a deposit, *there being no fraud, and the check genuine*, the parties are no less bound and concluded than in the former case. *Neither can disavow or repudiate what has been done.* The case is merely one of an executed contract. There are the requisite parties, requisite consideration and the requisite concurrence and asent of the minds of those concerned."

Upon the faith of this decision of this Honorable Court, we contend that privity arose between the First National Bank of Macon and the plaintiff in error, as soon as the check in question was received

and accepted by the plaintiff in error as a deposit, because we have shown in Section VI that there was no fraud and because it was not denied that the check was genuine.

X.

All Questions Embodied in the Assignments of Error, as to the Weight and Construction of Testimony, Should be Wholly Disregarded.

Assignment of Error No. 3c, complains that the trial Court *misconstrued* certain testimony, and Assignment No. 3d, merely sets forth how that particular *testimony should have been construed* and applied by the Court. It is only necessary to say in this regard that, as has been shown in Section III of this Brief, under the most favorable construction for the Plaintiff in error of the effect of the respective motions of counsel for peremptory instructions, we are limited at least to the question whether or not there was any evidence to support the Court's findings of fact. It is only formally charged that there is no evidence to support the findings of fact, but there is no serious attempt made to support such charge with argument, or specific citations. Whereas, in the appendix it is elaborately and conclusively shown that each and every finding of fact is supported by

ample evidence. Furthermore, at the conclusion of the general finding of facts and before the case was given to the jury, counsel for plaintiff in error were, at their request, allowed to suggest additional facts to be found, but they failed to even suggest that the Court consider the findings of fact embodied in said Assignments.

Assignment No. 3b charges that Mr. Hurt knew of the indebtedness of R. H. Plant to the plaintiff in error, and that his knowledge amounted to knowledge on the part of the First National Bank. Mr. Hurt was not called as a witness, and there is absolutely no proof in this record that he knew of such indebtedness. He did not keep Plant's books, and the Court refused to find as a fact that he did have such knowledge. But as he was acting solely and exclusively for Plant's Sons' Bank and R. H. Plant personally, in all transactions surrounding the handling of the check in question, if he should have had such knowledge it could have been imputed only to Plant's Bank or to Plant personally.

For these reasons it is insisted that said assignments should be wholly disregarded, and especially because the latest decision of this Honorable Court upon the legal effect of similar motions to those in this case, positively holds that unless the ruling of the trial court was wrong, *as a matter of law*, the judgment must stand.

Sena v. *American T. Co.*, 220 U. S., 497.

XI.

Where One of Two Persons Must Suffer Loss, He Should Suffer Whose Act or Neglect Occasioned the Loss.

In regard to the duty of the bank upon whom a check is drawn with relation to the rights of the payee of the check to, even later on during the same day, treat a check which had been received by the receiving teller and laid aside for deposit as paid, or not, as it pleased, this Honorable Court, in the Burkhardt case, said:

> "If the bank proposed to hold the check on conditions, it was but fair and just to the other party (the payee) to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payee might have depended on the promptitude and knowledge of their conduct. Delay until after bank hours might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a bank under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor."

Opposing counsel have not cited any case that holds that where a *bona fide* holder for value acquires a

check, and that check is presented by such *bona fide* holder, and the amount thereof paid said holder, or put to his credit in such bank, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as against a third party under such a state of facts.

The only loss or detriment suffered by the American National Bank, and the only loss alleged by them, is the fact that they would, if forced to pay this money, lose the right to setoff and appropriate it to an indebtedness, which at the time was not due, that Plant owed them upon his unsecured drafts held by them.

This was a fact and circumstance of which Plaintiff below was entirely ignorant, and there is not the slightest evidence tending to show that the First National Bank had any knowledge, or cause to believe the Defendant below held unsecured drafts or other evidence of indebtedness against Plant, the drawer of the check in question. Any injury, if any there be, to the American National Bank, was caused by its own deliberate and premeditated negligence in accepting unsecured drafts to the amount of $50,000.00 drawn by I. C. Plant on himself and accepted by him, and if the Defendant had not been guilty of

such negligence, their payment to the First National Bank of Macon, of his check of $3,000.00, could not have harmed them in the slightest degree.

It would be contrary to all reason and logic to say that a person who has a check cashed, having knowledge of facts which, if known by the drawee bank, would cause them to refuse payment, could be made to refund the amount so paid by the bank, he having received the same in entire ignorance of peculiar conditions of the business relations between the drawer and the bank.

Especially when such conditions are brought about by the deliberate action on the part of the bank. Such holding would cast upon the depositor of a bank the entire burden and risk of the bank upon all of its bad or unsecured paper. It casts a presumption of knowledge upon the customer of the bank upon the legality, as well as to the value, of all the loans made by the bank. It would create the relationship of general investigator in every depositor, of all the paper of every character held by the bank, which might be acquired by such depositor on that particular bank.

XII.

A Just Debt Could Not Have Been Conceived in Fraud or Discharged in Iniquity.

Counsel for both parties have solemnly, formally and conclusively confirmed in this cause as follows: "That on May 14, 1904, R. H. Plant was *justly indebted* to the First National Bank of Macon, Georgia, in the sum of Three Thousand ($3,000.00) Dollars." Stipulation of Agreed Facts, Record, page 2.

And it was in accordance with said stipulation of counsel that the trial Court found the following facts: "I further find as a fact, from the proof, that the $3,000.00 check drawn by Plant was *taken* by the First National Bank of Macon, Georgia, as a credit on a balance of a much larger amount *that R. H. Plant then owed the First National Bank,* of Macon, Georgia." Record, page 105.

A "just debt" is only popular substitute for the longer phrase, "righteous obligation." The adjective "just" has exactly the same meaning and import as the words righteous, true and upright. Therefore, a debt that is admitted and found by the Court to be a just, upright and righteous debt, cannot be proven to be a debt that was conceived in fraud and discharged in iniquity.

Yet opposing counsel, without any assignment of error to support it, and for the first time in this Court, uses much space and argument in his Brief, in the futile attempt to show that Plant gave the check in question to the First National Bank for the fraudulent purpose of denying to the plaintiff in error the right to apply the amount of said check towards the payment of Plant's indebtedness to it, and that the First National Bank, in furtherance thereof, fraudulently concealed at the time the check was presented to and paid by the plaintiff in error, the knowledge that Plant was so doing and was insolvent.

But we insist that opposing counsel is estopped by his solemn admission and the Court's finding to the contrary, from making such a claim and that this Honorable Court, in pursuance thereof, should wholly disregard any such claim or argument.

CONCLUSION.

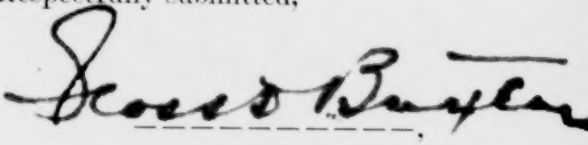
Counsel have cited in this case several decisions of the Courts of Georgia and other States upon similar questions to the one involved in this case. The question presented to this Court is one based not upon the law of the State of Georgia, but upon the common law of the country, and the cases are in accord to the effect "that the conclusion of a State Court as to what is the law upon a subject is not binding upon the United States Courts when based, not upon a statute of the State, but upon the view taken by the State Court of the common law of the subject."

Murray v. *C. & N. Rwy. Co.*, 92 Fed. Rep., 868;
Railway Co. v. *Baugh*, 149 Fed. Rep., 368;
Levy v. *Selwan*, 11 Wall., 244;
Clerk v. *Beaver*, 139 U. S., 96.

But opposing counsel have not cited any case that holds that where a *bona fide holder* for value acquires a check, and that check is presented by such *bona fide holder*, and *the amount thereof paid said holder, or put to his credit in such bank*, that such a transaction between the bank and the payee of the check can be repudiated, or that such amount could be recovered from the payee of a check by the bank paying said check; nor can they cite a case giving the bank the right of setoff as *against a third party* under such a state of facts.

Therefore we respectfully submit that under none of the theories advanced by the Plaintiff in Error is it entitled to retain the proceeds of this $3,000.00 check, but that, on the contrary, it is indebted to the Defendant in Error to the amount of said check, together with interest from July 25, 1907, the date upon which suit was brought, and consequently the judgment of the lower Court should in all things be affirmed.

Respectfully submitted,



Attorney for Defendant in Error.

APPENDIX.

Not Only Have the Findings of Fact Evidence to Support Them, But They Are Conclusively Established by Admitted Facts and Uncontradicted Testimony.

In order to show correctly every fact that was found by the lower Court, each paragraph of the Transcript of the Court's finding as set forth in full in the record is quoted, and immediately following every paragraph wherein facts are found is shown what evidence is in the record to support the same.

The following is the first paragraph of the Court's finding:

> "Gentlemen of the Jury, both the Plaintiff and the Defendant have moved the Court to give the jury peremptory instructions in this case in favor of the two sides, respectively, and under these two motions it becomes the duty of the Court to find the facts and give the jury peremptory instructions as to the verdict which they shall return."

As no fact or facts are found by the Court in that paragraph it will not be further noticed.

The second paragraph follows:

> "I am of the opinion that, in so far as the *prima facie* case of the Plaintiff is concerned, the Plaintiff has made out his case by the weight of the evidence and practically the undisputed evidence

and so find as a fact, that the Plaintiff has proved the material facts alleged in the declaration, in so far as they are necessary to make out the Plaintiff's *prima facie* case in reference to the three thousand dollar check in question, and the crediting that check to the First National Bank, Macon, Ga., of which Plaintiff is the agent, so that, unless the defenses set up by the Defendant bank in its pleadings, are made out by the proof and are well founded in point of law, the Plaintiff would be entitled to a verdict for three thousand dollars with interest from the time that demand was made for the payment of the check and refused by the Defendant bank."

In order to show conclusively that "every material fact alleged in the declaration" and found by the Court in the foregoing paragraph, to be facts, is not only amply supported by the evidence, but is admitted by opposing counsel to be true, the facts as alleged in the declaration (Record, pp. 114, 115, 116, 117, 118), are set forth in a column below and directly opposite thereto are to be found facts taken separately from the agreed statement of facts as printed in the Record (pages 2, 3 and 4):

Facts in Declaration.	*Facts in Stipulation.*
"The Plaintiff, A. L. Miller, as agent for the First National Bank of Macon, Georgia, a banking corporation duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and a citi-	"I. That A. L. Miller, the Plaintiff in this cause, is agent for the First National Bank of Macon, Georgia, which bank is a banking corporation, duly formed, chartered, organized and existing under and by virtue of the

Facts in Declaration—Continued.

zen of the State of Georgia, and of the United States of America, by his attorneys, complains of the Defendant, the American National Bank of Nashville, Tennessee, a banking corporation, duly formed, chartered, organized and existing under and by virtue of the laws of the United States of America, and a citizen of the State of Tennessee; a citizen of the United States of America; and inhabitant of the Middle District of Tennessee, and says:"

(1st para. Declaration.)

"1st Count: Plaintiff avers that on May 14th, 1904, and for some time prior thereto, both said First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were respectively depositors in, and kept running accounts with the aforesaid Defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant on that date had to his credit in said Defendant Bank more than

Facts in Stipulation—Continued.

laws of the United States; and is a citizen of the State of Georgia and of the United States of America.

"II. That the American National Bank of Nashville, Tennessee, the Defendant, is a banking corporation, duly formed, chartered, organized and existing under and by virtue of the laws of the United States, and is a citizen of the State of Tennessee and of the United States of America, and is an inhabitant of the Middle District of Tennessee; and that as such corporation it has a right to do a general banking business."

"III. That on May 14, 1904, and for some time prior thereto, the First National Bank of Macon, Georgia, and R. H. Plant, also of Macon, Georgia, were respectively, depositors in and kept running accounts with the Defendant, the American National Bank of Nashville, Tennessee, and that said R. H. Plant, on the 14th day of May, 1904, had to his individual name and credit, in the American National Bank of

Facts in Declaration— Continued.

the sum of three thousand dollars."

(2d para. Declaration.)

"Plaintiff further avers that on May 14th, 1904, said R. H. Plant, being justly indebted to said First National Bank of Macon, Georgia, drew his check on said American National Bank of Nashville, Tennessee, in favor of said First National Bank of Macon, Georgia, in the sum of three thousand dollars, and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness, which check said First National Bank of Macon, Georgia, endorsed and forwarded the same through the mails to said Defendant bank, with instructions to place the same to the credit of said First National Bank of Macon, Georgia, on the books of said Defendant bank."

(3d para. Declaration.)

Facts in Stipulation— Continued.

Nashville, Tennessee, more than three thousand ($3,000) dollars."

"IV. That on May 14, 1904, R. H. Plant was justly indebted to the First National Bank of Macon, Georgia, in the sum of three thousand ($3,000.00) dollars.

"That on said 14th day of May, 1904, R. H. Plant drew his check on the Defendant in the said American National Bank of Nashville, Tennessee, made payable to and in favor of the First National Bank of Macon, Georgia, in the sum of $3,000.00, and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness."

"V. That said check so delivered to the First National Bank of Macon, Georgia, was by said First National Bank of Macon, Georgia, endorsed and forwarded, together with instructions, through the United States mails, on that date to the American National Bank, the Defendant, to place the same to the credit of the First National Bank of

Facts in Declaration—Continued.

"Plaintiff further avers that said Defendant bank received said check on May 16, 1904, and in accordance with the aforesaid instructions, on the aforesaid date, placed the amount of said check to the credit of the First National Bank of Macon, Georgia, and charged the amount thereof against said R. H. Plant, the drawer of said check as aforesaid, and on said date duly notified said First National Bank of Macon, Georgia, to that effect."

(4th para. Declaration.)

"Plaintiff further avers that on or about May 16, 1904, said First National Bank of Macon, Georgia, became insolvent; that on or about said date Walter F. Albertson was duly appointed receiver of said bank by the

Facts in Stipulation—Continued.

Macon, Georgia, on the books of the Defendant, the American National Bank of Nashville, Tennessee."

"VI. That the American National Bank, the Defendant, received said check on Monday, May 16, 1904, and, in accordance with the instructions sent it by the First National Bank of Macon, placed the amount of said check on its books to the credit of the First National Bank of Macon, Georgia, and charged the amount thereof against R. H. Plant, the drawer of said check, and on said date, viz.: May 16, 1904, duly notified the First National Bank of Macon, Georgia, through the United States mails, to that effect. That on May 16, 1904, a petition in bankruptcy was filed against R. H. Plant, at 11 45 o'clock a. m."

"VII. That on May 16, 1904, said First National Bank of Macon, Georgia, was insolvent; that on the same date Walter F. Albertson, was duly appointed receiver of said Bank by the Comptroller of the Currency, under the

Facts in Declaration— Continued.

Comptroller of the Currency, under the provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, Chapter 156; that on July 20, 1904, said Albertson resigned as said receiver and W. J. Butler was duly appointed by said Comptroller of Currency to succeed said Albertson as receiver aforesaid; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said last mentioned receiver, and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, said Plaintiff, A. L. Miller, was duly elected and qualified as agent of the said bank and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said Davis as agent as aforesaid and to continue the winding up of the affairs of said bank."

(5th para. Declaration.)

Facts in Stipulation— Continued.

provisions of Section 5234 of the Revised Statutes of the United States and Section 1 of the Act of Congress of June 30, 1876, Chapter 156; that on July 20, 1904, said Albertson resigned as such receiver and W. J. Butler was duly appointed by the Comptroller of the Currency to succeed said Albertson as receiver; that on or about July 1, 1906, B. M. Davis was duly elected and qualified as agent of said bank under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed W. J. Butler as receiver of said First National Bank of Macon, and to continue the winding up of the affairs of said bank; and that on or about July 9, 1906, the Plaintiff, A. L. Miller, was duly elected and qualified as agent of the First National Bank of Macon, under and by virtue of Section 3 of the Act of Congress of June 30, 1876, Chapter 156, to succeed said Davis as agent aforesaid, and to continue the winding up of the affairs of said bank."

Facts in Declaration—Continued.

"Plaintiff further avers that under and by virtue of his election and qualification as agent of said First National Bank of Macon, Georgia, as aforesaid, he became vested with the title to and entitled to the possession of all of said insolvent bank's property and assets and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check."

(6th para. Declaration.)

"Plaintiff further avers that said R. H. Plant prior to May 14, 1904, drew certain time drafts payable to his own order and aggregating fifty thousand dollars, which drafts were drawn upon and accepted by I. C. Plant's Sons Bank of Macon, Gerogia, and were afterwards endorsed by the said R. H. Plant for value to the Defendant; but Plaintiff avers that when the Defendant received said check from said First National Bank of Macon, Georgia, and credited the amount thereof to the credit of said First National Bank and charged the same amount to said Plant as aforesaid, said Defendant thereafter held the said

Facts in Stipulation—Continued.

"VIII. That under and by virtue of his election and qualification as agent of the First National Bank of Macon, the Plaintiff, A. L. Miller, became vested with the title to and entitled to the possession of all of said insolvent bank's property and effects, and empowered to bring suit for the purpose of obtaining the same and collecting and receipting for the amount of said check."

"IX. That said R. H. Plant, prior to May 14, 1904, and May 16, 1904, drew certain time drafts, payable to his own order, and aggregating fifty thousand ($50,000.00) dollars, which drafts were drawn upon and accepted by R. H. Plant, doing a banking business under the name of I. C. Plant's Sons Bank of Macon, Georgia, and were afterwards endorsed by the said R. H. Plant, for value, to the defendant, the American National Bank of Nashville, Tennessee.

"None of said drafts were due on May 16, 1904, nor did they become due for some time after May 16, 1904."

Facts in Declaration— Continued.

amount of three thousand dollars, represented by said check, for the use and benefit of said First National Bank of Macon, Georgia, and under an implied promise to said First National Bank of Macon, Georgia, to pay to it the amount of said three thousand dollars on demand."

(7th para. Declaration.)

"It is further averred by Plaintiff that, although due demand for the payment of said sum of three thousand dollars so deposited and held by said Defendant bank, by and for the use of said First National Bank of Macon. Georgia, has been duly made by Plaintiff upon said Defendant bank, said Defendant bank has failed and refused and still fails and refuses to pay said sum or any part thereof to Plaintiff as agent aforesaid."

(8th para. Declaration.)

Facts in Stipulation— Continued.

"X. That the Plaintiff, A. L. Miller, and his predecessors, have made due demand upon the Defendant, the American National Bank of Nashville, for the payment of the sum of three thousand ($3,000.00) dollars, the amount of said check drawn by R. H. Plant in favor of the First National Bank of Macon, Georgia, which check was received by the Defendant, the American National Bank, and by it duly credited on the 16th day of May, 1904, to the credit of the First National Bank of Macon, Georgia; but said Defendant, the American National Bank of Nashville, failed and refused and still fails and refuses to pay said sum or any part thereof to Plaintiff."

The foregoing comparison sets forth every fact alleged in the declaration, and by an examination of the facts directly opposite thereto it will be seen that every fact therein alleged is agreed by counsel for Plaintiff in error to be true.

It is, therefore, insisted that the Court's finding that the "material facts alleged in the declaration" are true, was amply justified by the evidence, as shown by said comparison.

The third paragraph of said finding is as follows:

> "In that view of the case it becomes necessary to find whether the Defendant has made out the defenses set up in its pleas. In reference to those defenses, I find the material facts established by the weight of the evedince to be as follows:
>
> "First, that the day that check was drawn by R. H. Plant, Plant was insolvent, and that he knew his own insolvency; that he was on that date the president of the First National Bank of Macon, Ga., and had been for some time; that R. H. Plant was also on that date indebted to the Defendant, the American National Bank of Nashville, in the sum of fifty thousand dollars on account of his accepted drafts which had been endorsed over to the American National Bank, and were then held by it, so although the said accepted drafts were not then due and did not mature until some time after April 16, 1904; and that R. H. Plant himself knew that the American National Bank on the day the three thousand dollars check was drawn on it on Plant's account, and on May 16, 1904, when it charged that check

to Plant's individual account and credited it to the account of the First National Bank of Macon, Ga., as I find it did, and advised them of that credit by letter of advice, had no knowledge of Plant's insolvency, it didn't know that he was then insolvent or that the petition in bankruptcy had been filed against him."

We admit for the purpose of the questions now being reviewed that every material fact found in the paragraph just quoted is true, and as every fact found therein is in favor of the Plaintiff in error, and averred by it to be true, it is deemed unnecessary to give further consideration thereto.

The fourth paragraph is as follows: (Records 105, 106.)

(1) |"I further find as a fact, from the proof, that the three thousand dollar check drawn by Plant was taken by the First National Bank of Macon, Ga., as a credit on a balance of a much larger amount that R. H. Plant then owed the First National Bank of Macon, Ga., arising out of the clearing house transactions, and when it had been so taken as a credit, it was forwarded by the First National Bank on
(2) May 14, 1904, as shown by stipulation of facts;] |that R. H. Plant was a large stockholder and president in the First National Bank and controlled its policy and management, and that it was a general custom in the bank to accept and discount any paper that he might send to them, and to credit upon his account any paper that he might

send for the purposes of credit, but that paper received for the purpose of credit was generally credited by the bank irrespective of any such custom, under a general habit to credit whatever a man would send for the
(3) purpose of credit;] [that at the time this three thousand dollar check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks, although he had been in frequent, if not daily, communication with the officers of the bank;]
(4) [that he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness; at least, there is no evidence that shows that
(5) fact by the weight of the evidence;] [that the officers and agents of the First National Bank of Macon, who were conducting its affairs during his sickness, and who received and accepted this three thousand dollar check and forwarded it to the defendant bank, had, when they received and forwarded it, no knowledge of Plant's insolvency, and that they furthermore had no knowledge of the fact that Plant was individually indebted to the American National Bank by reason of his five (the word 'fifty' is written in pencil over the word 'five'—*Clerk*) thousand dollars; they did not know that he was then indebted to the American National Bank in
(6) any sum;] [that the private bank of I. C. Plant's Sons, which was really Plant himself, he doing business under that name,

closed its doors early on the morning of the 16th and was insolvent, and that a petition in bankruptcy was filed against Plant himself after eleven o'clock that morning, and that he was subsequently adjudged a bank-
(7) rupt.] [That the officers of the First National Bank at Macon, Ga., knew, according to the weight of the proof, that that petition in bankruptcy had been filed, and they knew of the suspension of business of Plant's private
(8) bank after it occurred;] [that the First National Bank of Macon was also compelled to close its doors something after nine o'clock of the same morning and did close its doors;]
(9) [that later in the day, some time after the closing of the First National Bank, the American National Bank of Nashville credited the account of the First National Bank of Macon with the amount of his three thousand dollar check and sent a letter of advice to the First National Bank of Macon on the
(10) night mail;] [that when that credit was entered up, the officers of the American National Bank of Nashville had no knowledge of Plant's insolvency or of any of the matters that had occurred on that day at Macon, Ga., and that the officers of the First National Bank of Macon, who had forwarded the three thousand dollar check on the 14th, did not notify by telegram, the American National Bank of the fact of the filing of the petition in bankruptcy or of the suspension
(11) of Plant's private bank.] [That, thereafter, on learning these facts, within a few days the

American National Bank changed back its entries on the books and charged off that credit which it had given the First National Bank for the three thousand dollar check and applied the balance, or endeavored to apply by book entries, the amount of the balance standing to Plant's individual account, which was something over three thousand dollars, independent of this check, to
(12) that $50,000.00 indebtedness;] [that subsequently, at a precise date not apparent, the First National Bank or its representatives who had title to its claim, whatever its claim might be, made demand on the American National Bank for payment of that three thousand dollars which had been credited to that bank on the 16th, and that the American National Bank refused to pay it. Now, those are the material facts, as I find them."]

Record, pp. 105, 106.

As the foregoing paragraph is long, and, therefore, necessarily tedious, it has, for convenience, been divided into natural divisions within brackets and each of said divisions numbered consecutively from 1 to 12.

Every material fact included within the *first* set of brackets, as stated by the Court, is contained in the stipulation of agreed facts, in the following language:

"That on May 14, 1904, R. H. Plant *was justly indebted* to the First National Bank of Macon,

Ga., in the sum of three thousand ($3,000.00) dollars." (*Italics ours.*)

"That on said 14th day of May, 1904, R. H. Plant drew his check on the Defendant, (in) the said American National Bank of Nashville, Tennessee, made payable to and in favor of the First National Bank of Macon, Georgia, in the sum of $3,000.00. and delivered said check to said First National Bank of Macon, Georgia, in payment of the aforesaid indebtedness."

Record, p. 2.

Furthermore, none of these facts have ever been denied by Plaintiff in error, and they certainly cannot be challenged now.

The findings of facts included in the *second* set of brackets cannot be consistently objected to by Plaintiff in Error because they are based solely upon testimony introduced by its counsel, and which was given by witnesses introduced in its behalf. This will be shown by an examination of pages 6 and 24 of the record, where the exact testimony supporting said findings is transcribed. Furthermore, the facts therein found have never been denied, and it is confidently asserted that they never will be.

The finding included within the *third* set of brackets, as follows:

"That at the time this three thousand dollar check was drawn, R. H. Plant was not at the bank and had not been there for some five or six weeks, although he had been in frequent, if not

daily, communication with the officers of the bank,"

was based upon the positive and uncontradicted testimony of Messrs. Findley, Plant and Stallings, each of whom testified unequivocally to said facts.

Record, pp. 84, 91 and 95.

Also, the finding within the *fourth* set of brackets, as follows:

"That he gave no specific directions in reference to this particular check to the officers of the First National Bank, who were conducting his affairs during his sickness, at least, there is no evidence that shows that fact by the weight of the evidence,"

was based upon the positive and uncontradicted testimony of Messrs. Findley and Plant, each of whom testified unequivocally to said facts.

Record, pp. 89, 93.

The finding included within the *fifth* set of brackets, to the effect that none of the officers of the First National Bank who were conducting the affairs at the time the check was accepted and forwarded to the Defendant, knew of Plant's insolvency, nor of Plant's indebtedness to the Defendant in any sum, is unequivocally supported by unanimous and uncontradicted testimony of Messrs. Finley, Plant and Stallings.

Record, pp. 85–86, 92, 93, 97–98.

As to whether the finding enclosed within the *sixth*

set of brackets is supported by the evidence, it is only necessary to cite paragraph VI of the Stipulation of Facts (Record, p. 6), wherein it is admitted that Plant was, as found, bankrupt and insolvent on May 16, 1904, and also to the averments of the third plea of the Defendant (Record, p. 122), where every fact herein found is averred to be true.

The findings in brackets numbered 7 *and* 8 are, in all material respects, identical with the averment of fact contained in each of the Defendant's three pleas (Record, pp. 119, 121, 122), which is as follows:

> "When said charging and crediting of said check by Defendant took place, and when advice of the same was mailed to the First National Bank, the Defendant was entirely ignorant of said Plant's insolvency, and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension, On the other hand, said First National Bank had knowledge of said suspension and bankruptcy as soon as it took place, and did not notify Defendant of either."
>
> Record, p. 121.

As these findings were based upon facts averred by the Defendant to be true, it is insisted that Defendant is estopped from denying that they are true.

Every fact found within the *ninth* set of brackets is admitted by Plaintiff in Error in paragraph VI of the Stipulation of Facts (Record, p. 2), to be true, and are, therefore, supported by the best of evidence.

The findings of fact set forth within brackets numbered 10 are in all meterial respects identical with the averment of facts contained in each of the Defendant's three pleas (Record, pp. 119, 121 and 122), which is as follows:

> "When said charging and crediting of said check by Defendant took place, and when advice of the same was mailed to the First National Bank, the Defendant was entirely ignorant of said Plant's insolvency, and of the suspension of his bank and of the filing of the petition in bankruptcy and of the insolvency of the First National Bank and of its suspension. On the other hand, said First National Bank had knowledge of said suspension and bankruptcy as soon as it took place, and did not notify Defendant of either."
>
> Record, p. 121.

And as these findings were based upon facts averred by the Defendant to be true, it is insisted that Defendant is estopped from denying that they are true.

The facts found within brackets numbered 11 are averred in Defendant's plea (Record, p. 123), as follows:

> "Under the laws of the State of Georgia, and also under the laws of the State of Tennessee, Defendant had a lien on said deposit for the indebtedness due it and had the right to set off *pro tanto* the entire amount due from it to said Plant against the fifty thousand dollar indebtedness due it from said Plant, and would have exercised the right to set off had it known of said Plant's

insolvency, suspension or bankruptcy. Defendant supposed him to be entirely solvent and supposed his bank to be still open and transacting business, and it was under such mistake that such charging and crediting of the check took place and advice thereof was sent to the First National Bank. Within a short time after Defendant learned of said Plant's insolvency, suspension and bankruptcy, it charged back to said First National Bank said check for $3,000 and credited the same to said Plant's account for the purpose of exercising its right of set-off. . . ."

As these findings were also based upon facts averred by the Defendant to be true, it is earnestly insisted that said Defendant is estopped from denying that they are true.

The facts found within brackets numbered 12 are specifically admitted in paragraph I of the Stipulation of Facts (Record, pp. 3 and 4) to be true, and, therefore, cannot be denied.

The two remaining findings of fact, which conclude all of the findings by the Court, to be found at pages 107 and 108 of the Record, were requested by the Defendant, and it cannot now complain with good grace that the Court's findings thereupon were not supported by legitimate evidence.